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IN THE

Supreme Court of the United States

OCTOBER TERM 1934

No. 22

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc.,

Petitioner,

against

A. W. PERRY, INC.,

Respondent.

MOTION AND BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WALTER E. HOPE,
H. STRUVE HENSEL,
Amici Curiae.

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A. W. PERRY, INC.,

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER

Now come Walter E. Hope and H. Struve Hensel of 15 Broad Street, New York City, and move this Honorable Court for leave to file the annexed brief as *amici curiae* in support of petitioner, the consent of counsel for petitioner and of counsel for respondent having been first obtained.

The undersigned ask this leave as counsel for Roy A. Heymann, Chandler Hovey and Thomas H. McInnerney, as Trustees in Bankruptcy of Louis K. Liggett Company, appointed pursuant to an order of the United States District Court for the Southern District of New York in bankruptcy proceedings entitled "In the Matter of Louis K.

Liggett Company, Bankrupt—In Bankruptcy No. 56900." In that proceeding there were filed four claims, aggregating $399,765.34, which are based upon lease clauses almost identical with the lease clause here involved. All of such claims were objected to by the Trustees in Bankruptcy of Louis K. Liggett Company and litigation in respect thereof has been commenced and will be re-opened or is now pending in the United States District Court for the Southern District of New York and in the Circuit Court of Appeals for the Second Circuit. Furthermore, pursuant to an agreement of compromise and settlement, confirmed by the United States District Court for the Southern District of New York after a special meeting of all creditors, there is now reserved and will be paid, if such claims are held provable in the amounts filed, a dividend of 85% or $339,800.54. These four disputed claims aggregate almost as much as all other claims allowed to landlords, approximately 345 landlords having proved general claims aggregating $458,-870.02.

There are two additional disputed claims aggregating $282,902.59, the determination of which claims involves the validity of certain acceleration of rent clauses which, it has been contended by claimants, are provable in accordance with the principles announced by the United States Circuit Court of Appeals for the Second Circuit in the instant case. Dividends are now reserved upon such claims in the amount of $250,527.88 (more than 85% inasmuch as part of such claims are alleged to be preferred). Such claims have been held to be not provable by the Referee in Bankruptcy but a petition has been filed for the review of such decision and order by the United States District Court for the Southern District of New York.

Practically all other disputed claims in the Louis K. Liggett Company bankruptcy have been finally determined and the ultimate liquidation of that estate is dependent largely upon the decision of this Court in the instant case.

New York, N. Y., September 15, 1934.

WALTER E. HOPE,
H. STRUVE HENSEL,
Office and Post Office Address:
15 Broad Street,
New York, New York.

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ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF WALTER E. HOPE AND H. STRUVE HENSEL, AS AMICI CURIAE IN SUPPORT OF PETITIONER

Opinions Below

Neither the opinion of the Referee (R. 13-23) nor the opinion of the District Court (R. 26) is reported in the Federal Reporter or Federal Supplement. The opinion of the United States Circuit Court of Appeals is reported in 69 Fed. (2nd) 90.

Statutes Involved

Section 63 of the Bankruptcy Act, as applicable to this case, provides*:

> "*Debts Which May Be Proved.*—a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.
>
> b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

*See Appendix A for amendments of June 7 and 18, 1934, which are not here applicable except to disclose the intent of Congress that the instant type of claim was not provable prior to the enactment thereof, as explained *infra*, pp. 26 to 37.

Section 1 (11) provides:

> " 'debt' shall include any debt, demand, or claim provable in bankruptcy;"

Section 17 provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts," * * *

with exceptions not here material. (Act of July 1, 1898, Sections 1, 17 and 63, 30 Stat. 562, as amended; U. S. C. A., Title 11, Sections 1, 35 and 103.)

Statement

On September 30, 1932 Outfitters Operating Realty Co., Inc. (formerly known as Lerner Stores Corp., a Delaware corporation) was adjudicated a bankrupt upon its voluntary petition in the United States District Court for the Southern District of New York (R. 1).

On March 29, 1933 A. W. Perry, Inc., the claimant-respondent herein, as lessor of certain premises located at 459 Washington Street, Boston, Massachusetts, filed a proof of claim in the sum of $177,788 alleged to be for "Damages for breach of covenant to pay rent under a lease" (R. 5) dated January 28, 1929 leasing said premises to the bankrupt for a term of fifteen years and ten months from March 1, 1929 (*i.e.*, until December 31, 1944) at an annual rental graduated upward over the term of the lease from $35,000 for the first ten months to $39,805 for the last five years, plus certain taxes and other charges (R. 6-7). *Inter alia,* the lease contained the following covenant (R. 10):

> "and, for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee shall be deemed to constitute a breach of this lease, and thereupon, *ipso facto* and without entry or other action by the Lessor, this lease shall become and be terminated; and, notwithstanding any other provisions of this lease, the Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof less the fair rental value of the premises for the residue of said term."

Nothing appears in the proof of claim or in the record indicating how the damages in the amount of $177,788 were calculated.

On April 5, 1933 the Trustee in Bankruptcy obtained an order to show cause why the claim should not be disallowed and expunged (R. 3-4). At the hearing on such order to show cause, it was stipulated that all questions as to the amount of the claim, if provable, were reserved until after final determination of its provability (R. 13). The Referee disallowed the claim in its entirety, holding that, as a matter of law, the alleged damages were not provable, and entered an order expunging the proof of claim (R. 13-23).

Upon petition for review the order of the Referee was affirmed by the District Court (R. 26) upon the authority of the then unreported decisions of the Circuit Court of Appeals for the Second Circuit in *Brown* v. *Irving Trust Company* and *Manhattan Properties, Inc.* v. *Irving Trust*

Company (1933), 66 Fed. (2nd) 470, affirmed by this Court, (1934) 291 U. S. 320. Upon appeal, the judgment below was reversed and the proof of claim was remanded for liquidation, the damages declared to be the sum of the discounted series of instalments, each made up of the rent reserved less the fair rental value for that period (R. 31-35). This measure of damages was not precisely the measure provided in the lease covenant quoted above but a modification thereof deemed necessary by the Court to save the covenant from the prohibition of *Kothe* v. *Taylor Trust,* (1930) 280 U. S. 224 (R. 33).

The reversal of the decisions of the Referee and the District Court was explained by the Circuit Court of Appeals as necessary in view of the language of the above quoted covenant in the lease. It was held by such Court that the decision in *Manhattan Properties, Inc.* v. *Irving Trust Company,* (1934) 291 U. S. 320, left the door open for proving claims for damages for loss of future rent provided the correct clause or covenant was used (R. 32). The above quoted covenant (after modification of the provision as to the quantum of damages) was held sufficient because (a) the lease was terminated and the claim created *ipso facto* upon the filing of the petition in bankruptcy and (b) the modified measure of damages did not seem unreasonable (R. 32-33).

A writ of certiorari from this Court was applied for on the ground that such decision was a misinterpretation of the *Manhattan Properties* decision and, in fact, contrary thereto. The writ of certiorari was granted by this Court on May 14, 1934.

Summary of Argument

I

IT APPEARS ON THE FACE OF THE INSTANT CLAIM THAT IT IS NOT PROVABLE UNDER THE DECISION OF THIS COURT IN *Manhattan Properties, Inc.* v. *Irving Trust Company.*

The proof of claim admits on its face that it is for "Damages for breach of covenant to pay rent under a lease" (R. 5), which is the identical language used by this Court in *Manhattan Properties, Inc.* v. *Irving Trust Company, supra,* 333-334, 335*, in describing the category of unprovable real estate claims. Before this claim can be allowed, the *Manhattan Properties* case must be reversed and the language used by this Court therein must be substantially modified.

II

THE INSTANT CLAIM CANNOT BE MADE PROVABLE, CONTRARY TO THE BANKRUPTCY ACT, BY AN AGREEMENT BETWEEN CLAIMANT AND THE BANKRUPT.

Congress has prescribed the various classes of provable claims according to the substance and inherent nature of the claims involved. Parties to a lease cannot escape the effect of such prescription by agreeing as to what claims are provable and what are not provable.

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*Unless otherwise indicated, all references to the *Manhattan Properties* case refer to the decision of this Court reported in 291 U. S. 320.

Stripped of its legalistic verbiage, this instant covenant is merely an agreement that, in spite of the statute, a claim for damages for loss of future rent shall be provable. If the instant claim is sustained, all types of claims can be made provable (or not provable if desired) by mere agreement and irrespective of the statute.

III

The Intent of Congress to Exclude the Instant Claim from the Category of Provable Claims Is Clear and Has Been Recognized by This Court.

Such intent was clear before the 1934 amendments to the Bankruptcy Act as demonstrated by the historical review of the intent of Congress as made in *Manhattan Properties, Inc.* v. *Irving Trust Company, supra,* 332-337.

Inasmuch as the 1934 amendments [new clause (7)] to Section 63a of the Bankruptcy Act now make the instant claim provable in future bankruptcies in a limited amount (not more than rent for one year after the date of surrender), such type of claim could not have been intended to be provable prior to the enactment of such 1934 amendments and, therefore, not in this case.

Such conclusion is clear and is important not only in respect of this claim but in respect of future bankruptcies. If the instant claim is not expunged, it will have been construed as outside the scope of new clause (7) of Section 63a and, therefore, all landlords using the mystical language here used will prove their claims in full. The intent of Congress to limit such claims in the future to a comparatively small amount will thus be evaded.

ARGUMENT

I

It appears on the face of the instant proof of claim that it is not provable under the decision of this Court in *Manhattan Properties, Inc.* v. *Irving Trust Company*.

The proof of claim on its face frankly admits that the $177,788 claimed is for:

> "Damages for breach of covenant to pay rent under a lease." (R. 5)

In other words, claimant itself, in precise language of its own selection, has identified its claim with the very type of claim held to be unprovable by this Court in *Manhattan Properties, Inc.* v. *Irving Trust Company* (1934), 291 U. S. 320, 333-334, 335:

> "The courts uniformly held (under Act of 1867) that claims for future rent or *for damages for breach of covenant to pay rent* were not provable under the act, though differing as to the reason; some holding them not contingent claims within the statutory definition, and others thinking the express permission of proof for rent past due at the date of bankruptcy impliedly excluded claims for rents thereafter falling due. (333-334)
>
> * * *
>
> In view of the extended consideration and discussion which preceded the passage of the Act (of 1898), the failure to include a provision for claims for loss of rent or *for damages consequent on the abrogation of leases* is significant of an intent not

to depart from the precedents disallowing them." (335) (Italics and parenthetical references ours.)

The claimant has, therefore, on the face of the claim and long before the *Manhattan Properties* decision, admitted that the instant claim is not provable under the law as announced by this Court.

This argument is not mental "sleight of hand". It is not mere coincidence that claimant in March, 1933 selected the identical language to describe its proof of claim as was used by this Court in February, 1934 to describe the type of claim which, as a matter of legislative and judicial history, has always been unprovable. Until it became desirable for claimant to avoid the effect of the *Manhattan Properties* decision, claimant as well as everyone else recognized this claim as one "for damages for breach of covenant to pay rent" or "for damages consequent on the abrogation of leases." Certainly, in view of the normal and customary meaning of words and the identity of the types of claims as a matter of fact and substance, this Court could not have used such plain and unequivocal language, if it did not intend to prohibit the provability of this claim as well as all other similar claims. Fine spun legalistic reasoning may try to avoid the normal and customary meaning of words. But it cannot be done. Claimant has itself, unwittingly perhaps but nevertheless plainly, admitted the truth.

Furthermore, if the circumstances of the *Manhattan Properties* case be reviewed, the identity of this claim as a matter of substance with those defined by this Court as unprovable is inescapable. Although the covenants involved in the *Manhattan Properties* case were covenants of indemnity, the case was presented as a test case and the issue was made as wide as possible, *i.e.*, can claims for future rent

or damages for the loss thereof as a result of an adjudication of bankruptcy be proved against the bankrupt estate of a tenant? The landlord-claimant argued that all such claims were provable since as a matter of logic they were within the scope of Section 63a(4), being based upon an express contract. The respondent-trustee in bankruptcy argued that the construction of the statute was not a matter of logical interpretation of language but involved an historical analysis of the intent of Congress. The latter proposition was accepted by this Court and all claims for damages for loss of future rent were excluded unequivocally (in the language of this Court quoted above) from the category of provable claims. Exceptions in the case of this or any other claim were not suggested.

In addition, it should be noted that, as a practical matter, the damages sought to be proved here are the same in theory and manner of calculation as those denied provability in the *Manhattan Properties* case. Both leases were drawn on the theory that landlords should somehow, contrary to the intent of Congress, be given a provable claim against the estates of bankrupt corporate tenants. In both instances the damages sought to be proved were equal to the difference between the rent stipulated in the lease for the balance of the term and the alleged fair rental value of the premises in the future—in both instances the calculation involved a forecast and guess as to probable future values which are clearly impossible of accurate determination. All other legal consequences are also identical. In both instances the leases were terminated—in the *Manhattan Properties* case by action of the landlord and in the instant case upon the filing of the bankruptcy petition as provided in the lease. In both instances the trustee in bankruptcy had a reasonable time to remove from the

premises or consummate new arrangements. The only differences are in respect of words and phrases.

It is impossible to draw any conclusion from the foregoing quotation from this Court's *Manhattan Properties* decision, except that claims such as the instant claim are not provable. If the contrary interpretation by the court below is correct, the elaborate review by this Court of the earlier acts and cases, of the development of the British Act and of the rejection of Judge Lowell's proposed statute (making these claims provable) is rendered insignificant and practically meaningless. Yet such review takes up practically the entire decision and involves the selection of a theory of interpretation of the Bankruptcy Act of 1898 diametrically opposed to the interpretation of the court below. It is not modified or contradicted by the last two paragraphs of this Court's decision which merely discussed the logical inconsistencies of one of the landlord-claimant's arguments concerning indemnity covenants.

We must repeat—it appears on the face of the claim that it is not provable. This is not because claimant is chained to the language used in describing its alleged claim so that the substance and inherent nature of the claim cannot be examined. It is rather that the identity of claimant's language in describing its claim and this Court's language in describing a category of claims not provable as a matter of history and Congressional intent admits the substance and inherent nature of the claim and makes it now impossible for claimant to assert that the prohibition of the *Manhattan Properties* decision does not refer to this claim. The instant claim cannot be provable unless the *Manhattan Properties* case is reversed and the foregoing quotation therefrom is substantially modified.

II

The instant claim cannot be made provable, contrary to the Bankruptcy Act, by an agreement between claimant and the bankrupt.

There should be no illusions concerning the purpose or intent of the covenant in this lease. It was obviously devised for one purpose, *i.e.,* to give the landlord, in the event of bankruptcy, a provable claim for damages for loss of future rent (R. 18). This is generally known and, if not now admitted by claimant, was admitted in the covenant itself by the declaration that the purpose was "for the more effectual securing to the Lessor of the rent and other payments herein provided" (R. 10). Since the clause was operative only in the event of bankruptcy, it could only confer such security by raising a provable claim. In other words, this covenant was devised to give the landlords precisely what was denied to them in *Manhattan Properties, Inc.* v. *Irving Trust Company, supra.* It had no other function. No one ever expected the tenant to pay anything under this covenant. *Kothe* v. *Taylor Trust, supra,* 226. The only obligors under this covenant, if it should be sustained, are the unconsulted and vigorously dissenting other creditors of the bankrupt.

It was known that claims for future rent or damages for the loss thereof would not ordinarily be held provable. It was reasonably clear since *In re Roth & Appel* (1910), 181 Fed. 667, that covenants of indemnity would not suffice to turn an unprovable claim into a provable one. It was known since *Kothe* v. *Taylor Trust , supra,* that *ipso facto* termination of the lease upon bankruptcy and a stipula-

tion that all rent to accrue in the future should be immediately due and owing would not avoid the exclusion of such claims from the statute. Enterprising landlords and lawyers have, therefore, been searching for many years for a magical formula or covenant. The instant one is about the only one left untried and it succeeded once in an equity receivership case, although it was there clearly recognized by this Court as insufficient in bankruptcy where a precise statute is controlling. *Filene's Sons Co.* v. *Weed,* (1918) 245 U. S. 597, 601-602. Nevertheless, since the bankruptcy statute could not (until 1934) be changed, this possibly magical covenant was worth a chance. If it did not create a provable claim, it was realized that probably nothing could, short of an amendment to the statute which was not then feasible. The bankrupt was willing to have the covenant included in the lease, as it would never have to pay anything under it.* So the covenant was tried and, strangely enough, was held to be magical by the Circuit Court of Appeals.

But the only question in the case which was apparent to the Circuit Court of Appeals was (R. 32):

> Will this clause serve to create a provable claim?

By thus phrasing the question, the Court assumed that some covenant must have the necessary magic and thus missed what should have been the main and only question:

> Is there any covenant or group of words sufficiently magical to turn an unprovable claim into a

*The question of a discharge was not important in the case of a corporate lessee. But we have never heard of the covenant being used in a lease with an individual lessee who undoubtedly would be interested in the broadest possible discharge.

> provable one and to avoid the provisions of the statute and the intent of Congress?

Had the Circuit Court of Appeals considered that question rather than the one propounded, it is believed that such Court would have arrived at the opposite result as did the Referee, who stated (R. 19):

> "Mere language should not be able to create a charge against creditors which otherwise does not exist. Merely changing the label and calling the future unaccrued rent herein immediate damages, *ipso facto,* should not bring about such an undesirable result to the serious prejudice of the other creditors herein who hold 'just demands based upon adequate consideration' as pointed out heretofore."

Obviously, if this claim is sustained, the Bankruptcy Act becomes a "game of words". This is practically admitted by respondent in its brief in opposition to the writ of certiorari (p. 5):

> "Nor does the allowance of the claim in the instant case have any far reaching consequences since the lease stands on its own footing and is not a precedent for the allowance of other claims *unless based on identical language.*" (Italics ours.)*

Under such theory, the type of claim would not be important but the words used to create or describe the claim would be controlling. Such cannot be the law.

The fallacy in the entire argument of respondent and in the decision of the Circuit Court of Appeals can be demonstrated by stripping the covenant of its legal verbiage. The covenant would then read as follows:

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*This also ignores the fact that, if this claim be sustained, ***identical language*** will become extremely popular in the future.

> "In the event of the filing of a bankruptcy petition against the lessee, the lessor shall have a provable claim in the amount of $177,788."

The impropriety and ineffectuality of such type of covenant to raise a provable claim in bankruptcy is instantly recognized. Yet, while such type of covenant may be more naive and have less legalistic flavor or magic, it does not differ in substance, purpose or desired effect from the covenant here under consideration. If the instant claim is to be recognized, the magic of the words used is magic indeed.

It is submitted that this issue must be squarely met. Is the provability of claims to be determined by the language used in the covenants alleged to create the claims? Or is the statute to define the types of provable claims? Can parties, by stipulation or agreement or by the use of specifically approved words, define what claims shall be provable? Or is the intent of Congress as expressed in the Act to determine the provability of claims?

Such questions answer themselves and were categorically answered by this Court. Unless Congress remains supreme as the arbiter of how bankrupt estates are to be distributed, the door to the granting of a type of preference to certain creditors will be thrown wide open. Parties to an agreement cannot be permitted to stipulate what claims are provable. The instant covenant and this case are already famous. If the decision below is sustained, this covenant, now appearing in many leases (particularly in New England), will appear in all leases. Landlords will absorb the major portions of bankrupt estates. Landlords will be enabled to evade the purpose of the Bankruptcy Act as defined by this Court in *Kothe* v. *Taylor Trust, supra,* 227:

> "The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration. Any agreement which tends to defeat the beneficent design must be regarded with disfavor."

As will be hereinafter pointed out, even the limitation of rent claims to one year of rent in the new clause (7) of Section 63a will be of no avail.

In this connection, it should be noted that this Court was unfavorably impressed by the amount of the claim in the *Kothe* case, which was only $5,000. The instant claim is $177,788. Furthermore, the *Kothe* case lease had about one and a quarter years to run while the instant lease does not expire until December 31, 1944 (R. 7), *i.e.*, thirteen years from the date of bankruptcy (R. 1). The admonition of this Court in the *Kothe* case should be remembered (p. 227):

> "If the term were much shorter, or there were facts tending to disclose a proper purpose, the argument in favor of the lessor would be more persuasive."

Yet here the term is longer and the purpose the same. Furthermore, if this claim be sustained, imagine the effect on bankrupt estates of the inclusion of these covenants in 99 and 999 year leases.

If parties can by agreement determine what claims are provable, it is only logically consistent to hold that parties can by agreement determine what claims are not provable and, therefore, not dischargeable. This is not important in the case of corporations but it is most important in the case of individuals who might, by economic necessity or otherwise, be forced to waive the benefits of

the Bankruptcy Act and agree that certain claims would be not provable or dischargeable. Such state of affairs could obviously not be permitted to arise.

The decision below must be reversed. To hold otherwise, would of necessity mean that a stipulation between the parties can change an unprovable claim into a provable one. Such effect may be denied but it is obvious upon very little reflection. The only safe rule is to follow the statute. In Section 63a of the Bankruptcy Act Congress has defined the type of provable claims and as stated by this Court (*Manhattan Properties, Inc.* v. *Irving Trust Company, supra,* 336):

> "If the rule is to be changed Congress should so declare."

III

The intent of Congress to exclude the instant claim from the category of provable claims is clear and has been recognized by this Court.

A. Such intent was clear before the 1934 amendments to the Bankruptcy Act.

This proposition should not require any argument after the *Manhattan Properties Inc.* v. *Irving Trust Company, supra,* but at the risk of some repetition, the approach of this Court to the problem presented in that case will be briefly reviewed. This Court did not proceed to construe the pertinent Section 63a by a logical analysis of the language used therein or by analogy to other types of legal relationships. Claims for future rent and damages for the loss thereof were held unprovable not because they were uncertain as to

amount or liability or contingent at the date of the filing of the petition in bankruptcy. *Claims for future rent and damages for the loss thereof were held not provable because Congress did not intend such type of claim to be provable.* As stated by this Court (*Manhattan Properties, Inc.* v. *Irving Trust Company, supra,* 332):

> "The issue is not one of power, for plainly Congress may permit such claims or exclude them. *The sole inquiry is the intent of the Act.*" (Italics ours.)

As admitted by this Court in the *Manhattan Properties* case (p. 332), so in this case, the contention of claimant-respondent may have been, prior to that case, "as a matter of logic, an admissible one." Nevertheless, the apparent logic of the argument that future rent claims should be deemed provable under Section 63a (4) was disposed of adversely to the landlords simply by an examination of the intent of Congress. In this case as in the *Manhattan Properties* case, decisions will undoubtedly be cited in support of the argument that this claim is not contingent or uncertain. The alleged significance of the device of "*ipso facto* termination" of the lease may be expounded. It may be argued, as it was by the Circuit Court of Appeals (R. 32), that the instant claim became definite as to amount and liability on the date of the filing of the petition. All such arguments in so far as there applicable were made in the *Manhattan Properties* case and overruled. They are no more applicable here. The issue cannot thus be settled. Irrespective of such considerations, we are determining the intent of Congress with respect to the provability of a type of claim, *i.e.,* for damages for loss of future rent. Such intent alone controls.

Once such controlling principle is understood, it is a simple matter to search the legislative and judicial history of our Bankruptcy Acts from 1800 to date to determine just what type of claims Congress intended to include within Section 63a and, therefore, within the scope of the discharge provided for in Sections 1 (12), 14 and 17 of the Bankruptcy Act of 1898. It is not necessary to repeat here such history up to the commencement of the year 1934. It was reviewed at length in this Court's decision in the *Manhattan Properties* case (pp. 332-337) and at even greater length in the brief for respondent in that case (pp. 12-43). The most interesting fact to note, as pointed out by this Court, is that, while the reasons given by many courts varied (some being understandable and others being rather strained and swept away in other cases), neither Congress nor the courts ever intended that claims for future rent or for damages for the loss thereof should be provable or dischargeable. The reasons and explanations therefor as given by the various courts are unimportant. It is the intent of Congress which governs and a practical rule is frequently more desirable than a general rule of logic consistently applied to all similar legal relationships.

There is one more important principle certainly implied, if not expressed, in this Court's review of the intent of Congress as expressed in the Bankruptcy Act. Congress intended to make only certain definite types of claims provable. All other types of claims, including this one, were to be unprovable. It was not to be a question of the phraseology of the covenant upon which a claim might be founded, or a question of analogy to other types of claims, but rather a question of determining the intent of Congress,

as expressed, with respect to the substance of each type of claim. For instance, tort claims, unless merged into judgments, have been deemed not to have been included by Congress within the list of provable claims. Claims for workmen's compensation, even though liquidated by an award of the duly constituted state authority, were also regarded as unprovable. Likewise, as has been definitely and finally established, claims for damages for loss of future rent were nowhere included by Congress within the provisions of Section 63a and we cannot be so blind to essential matters as to assume that Congress intended to exclude a claim only in the event the proper language or clause was omitted. Congress was dealing with matters of substance. Methods of expression may be important but the administration of the bankruptcy law must be more concerned with substance.

It is, therefore, clear that the language and theory of the *Manhattan Properties* case require the reversal of the judgment below.

B. The intent to exclude claims for damages for loss of future rent prior to June, 1934 was unmistakably corroborated in the amendments to the Bankruptcy Act of June 7 and 18, 1934.

Since the decision in *Manhattan Properties, Inc.* v. *Irving Trust Company, supra,* there has been presented further evidence of the intent of Congress to exclude the instant claim from the category of provable claims defined in Section 63a of the Bankruptcy Act as applicable to this bankruptcy proceeding. It can be shown that, by recent amendments to Section 63a. Congress has made provable

for the first time claims for damages for the loss of future rent and then only in an amount not exceeding rent for one year after the date of surrender of the premises and only in bankruptcy proceedings in which the six months period had not expired at the time of the enactment of the amendments.* Obviously, if an amendment to the Bankruptcy Act was deemed necessary by Congress to make this claim provable in the future, this claim could not have been intended by Congress to have been provable in this bankruptcy proceeding in which the time to file claims expired March 31, 1933 (R. 1). *First National Bank* v. *Missouri* (1923), 263 U. S. 640, 658. The intent of Congress as set forth by this Court in the *Manhattan Properties* case is thus confirmed.

The truth of such conclusion is obvious when it is realized that Congress unmistakably included this type of claim within a new amendment adding new types of hitherto unprovable claims to the provable list; unmistakably indicated its belief that such amendment was a change in the existing law and unmistakably made such new amendment not applicable to this bankruptcy proceeding. If this claim had been provable in this case, Congress would not have so acted or expressed itself.

By Acts of Congress approved June 7 and 18, 1934 three new clauses [numbered (6), (6½) and (7)] were added to Section 63a of the Bankruptcy Act. Each of such new clauses dealt with a type of claim not provable prior to the enactment of such amendments.** Clause (6) made

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*Therefore, not applicable to this proceeding since the time for filing claims herein expired more than a year prior to the enactment of the amendments.

**The new clauses thus added to Section 63a are set forth in full in Appendix A.

provable workmen's compensation claims when founded upon the award of an industrial commission, other body or officer of any State or Territory having jurisdiction to make such awards. Clause (6½) made provable claims for damages evidenced by a judgment in any action for negligence instituted prior to the adjudication in bankruptcy and pending at the time of the filing of the petition in bankruptcy. Clause (7) referred to the instant type of claim and made provable claims for damages arising under executory contracts, including leases, but limited claims for damages or indemnity under a covenant contained in a lease to the rent stipulated in the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date.

New clause (7) is the only subdivision of Section 63a from which, strictly speaking, the past and present intent of Congress regarding future rent claims can be ascertained. But, in passing, it should be noted that the claims covered by new clauses (6) and (6½) were clearly not provable prior to the 1934 amendments. *Lane* v. *Industrial Commissioner,* (1931), 54 Fed. (2nd) 338, cer. denied 286 U. S. 543; *Schall* v. *Camors,* (1920), 251 U. S. 239. Since this is true in respect of two out of three new clauses, it is certainly persuasive, particularly in view of the recent agitation regarding landlords' claims and the obvious meaning of the *Manhattan Properties* case, that the same was intended to be true as to the third new clause, *i.e.,* clause (7).

But there are other evidences that by the enactment of clause (7) Congress intended for the first time to make claims for damages for loss of future rent (including this claim) provable in what may be termed "future bankrupt-

cies." This may be demonstrated by the establishment of two major propositions with respect to clause (7):

> (a) It was intended by Congress to change the then existing law and to add a new type of provable claim. (If such be the case, such type of claims could not have theretofore been provable.)
>
> (b) It was intended to include the instant type of claim within the definition of such new type of provable claim. (The instant type of claim was therefore not provable prior thereto.)

The first proposition is easily made apparent as it has been stated by Congress in almost *haec verba*. When the new amendments to Section 63a were first presented to the House of Representatives (H. R. 5884), clause (7) was plainly designated as one of a number of "changes in existing law" (House Report 194, 73rd Congress, 1st Session). Such designation, it is submitted, is conclusive of the intent of the House and, inasmuch as Senate Report 482 (73rd Congress, 2nd Session) reprinted House Report 194 as the sole explanatory note concerning the new amendments, equally conclusive as to the intent of the Senate. It is difficult to understand how, after such designation with respect to clause (7), any one can argue that Congress intended merely to clarify one of the other subdivisions of Section 63a which it believed had been erroneously interpreted by the courts.

In addition, the last proviso of clause (7) clearly indicates the belief of Congress that such clause dealt with an entirely new and different claim not theretofore provable. Such last proviso was approved in one form on June 7, 1934 and was later amended by an Act (S. 3779) approved

on June 18, 1934. In both its forms the last proviso clearly indicates the intent of Congress to create a new type of claim by clause (7). Such proviso, as first enacted, read as follows:

> "*Provided further,* That the provisions of this clause (7) shall apply to estates pending at the time of the enactment of this amendatory Act."

By the Act approved June 18, 1934 the applicability of clause (7) was limited "to estates pending at the time of the enactment of this amendatory Act in which the time for filing such claims has not expired." In reporting favorably upon this last amendment to clause (7) (S. 3779), the Senate Judiciary Committee said (Senate Report 1404; 73rd Congress, 2nd Session):*

> "The committee is of opinion that the provisions of clause (7), quoted above, should be limited in operation to those estates in which the time for filing claims has not expired. If applied to estates in which the time for filing claims has expired, these provisions would entail much inconvenience, expense, and confusion, in many cases necessitating the reopening of estates which are ready for final settlement and in which the time for filing claims expired many months ago. The sole purpose of this bill (S. 3779) is to avoid such undesirable results of the provisions of clause (7)."

Furthermore, upon the passage of the bill by the House, it was stated by the member moving its adoption that this amendment, limiting the application of clause (7), had by inadvertence been left out of the bill approved June 7, 1934 and that the amendment limited

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*House Report 2018, 73rd Congress, 2nd Session, is identical in language.

> "landlords filing their claims against bankrupt estates"

to proceedings in which the six months period had not expired (Congressional Record, Vol. 78, 73rd Congress, 2nd Session, p. 12078).

It is submitted that such last proviso of clause (7) would never have been passed in either its first or final form if Congress had not *thought* it was providing for a new type of claim in clause (7). If clause (7) was intended merely as a clarification of the first five subdivisions applicable to this case, the last proviso would have so stated. This becomes even more obvious when it is realized that such proviso was never proposed until the entire Act was passed in different forms by the Senate and the House and submitted to conference (Appendix B, cf. Nos. 3 and 4). In addition, the final form of the last proviso clearly provides that none of the provisions of clause (7) shall be applicable to estates in which the time for filing claims has expired. This is conclusive evidence that a new form of claim was created.

Some argument may be made to the contrary by insisting that clause (7) does not make provable a new type of claim inasmuch as a logical dissection of its language would include within the scope thereof claims of the type heretofore held provable in cases like *Central Trust Co.* v. *Chicago Auditorium Association* (1916), 240 U. S. 581. Such argument clearly ignores the designation of clause (7) as a "change in the existing law" and the form of the last proviso. It is realized that the language used by Congress in clause (7) is not as definite as might be desired. Nevertheless, it should be obvious from all of the foregoing that in spite of the loose reference to "executory contracts" there was no intent on the part of Congress to include within the

scope of clause (7) claims for damages similar to those presented in the *Chicago Auditorium* case.

It is also believed that the second proposition *i.e.,* that Congress intended to include the instant claim within the scope of clause (7), is equally clear. Unfortunately for its grammatical structure, clause (7) suffered an almost mushroom growth as a result of a number of amendments* and was not debated on the floor of either the House of Representatives or the Senate. It was first proposed and passed in very short form (H. R. 5884; Appendix B, No. 1); was modified first by an amendment of the Senate Committee on the Judiciary (Senate Report 482, p. 3, 73rd Congress, 1st Session; Appendix B, No. 2); was further changed on the floor of the Senate (Vol. 78, Congressional Record, 73rd Congress, 2nd Session, pp. 8109-8110; Appendix B, No. 3) was again modified by the Conference Committee of both houses (House Report 1821, 73rd Congress, 2nd Session; Appendix B, No. 4). Consequently the clause is difficult, if not impossible, to parse and must be read and interpreted in the light of the general background of recent events in bankruptcy law, such as the *Manhattan Properties* case and the general attack by landlords on the statutory exclusion of their claims from provability in corporate bankruptcies. When so examined there is no doubt but that Congress intended to include the instant claim within its permissive and restrictive provisions.

The clause as finally passed may be divided into four parts—

> (1) A general provision as to the type of claims made provable thereby (suggested and passed first by the House of Representatives);

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*The various forms through which clause (7) passed, are set forth in detail in Appendix B.

(2) A limitation as to the amount in which certain of such type of claims, *i.e.*, claims for damages for the loss of future rent, could be allowed (suggested first on the floor of the Senate);

(3) A declaration of policy with respect to the amount in which assigned future rent claims should be allowed (suggested first in conference after passage by both the Senate and the House); and

(4) A limitation of the applicability of the clause to bankruptcies in which the six months period for filing claims had not expired; thus excluding reference to this bankruptcy (partially first proposed in conference and modified by the subsequent amendment of June 18, 1934).

The first part of clause (7), *i.e.*, the general description of the type of claims made provable, was not changed from the form in which it was originally introduced and passed in the House. The phrase "claims for damages respecting executory contracts including future rents" has no punctuation and is most inartistic. Yet the words "future rents" must refer to damages and not to "executory contracts". Otherwise, the phrase is incoherent and meaningless. And it is well known that the term "future rents" has been customarily used in bankruptcy practice to refer not only to the entire rent to accrue under a lease in the future but also to damages for the loss of such rent resulting from bankruptcy. Congress obviously used the term in the same sense and the reference to "future rents" indicates an intent on the part of Congress to deal with all claims for damages arising out of a lease including a claim for rent which, except for the bankruptcy, would have

accrued in the future. Congress was familiar with all the various types of clauses inserted in leases in an effort to give landlords provable claims in bankruptcy, including those presented in the *Manhattan Properties* case; *Kothe* v. *Taylor Trust, supra; Filene's Sons Co.* v. *Weed* (1918), 245 U. S. 597; *In re Schechter* (C. C. A. 3rd Cir.-1930), 39 Fed. (2nd) 18. In all but the *Schechter* case (and then on a theory contrary to the *Manhattan Properties* case), the claims of the landlords had been held not provable in bankruptcy. Congress intended to make all such claims provable in the future, whether or not special covenants were included in the leases. A most comprehensive clause was selected. The sentence structure may be awkward but the intent is clear.

Furthermore, it will be noted that in the third part of clause (7), *i.e.,* the declaration of policy with respect to the amount in which assigned future rent claims could be allowed, Congress speaks first of "future rent claims" and then of "the amount of damages allowed assignee hereunder", thus clearly indicating that Congress intended to include all claims for damages for the loss of future rent (however they might arise) within the generally descriptive and all-inclusive phrase "future rent claims".

Having made all claims for loss of future rent as a result of bankruptcy provable, it was evident that such claims would have to be limited in amount. Otherwise the landlords would compel a return of their property and, in these days of long leases and numerous leaseholds, would by enormous claims (*e.g.,* the instant one) absorb the entire estate in bankruptcy to the detriment of other creditors. The first provision of limitation suggested by the Senate Committee on the Judiciary (Appendix B, No. 2) referred

only to an "anticipatory breach of an unexpired lease". This was obviously insufficient as claims might otherwise arise by express covenant. It was also confusing as bankruptcy had been held not to be an anticipatory breach of a lease. *Central Trust Co.* v. *Chicago Auditorium Association, supra; Manhattan Properties, Inc.* v. *Irving Trust Company, supra.* So the restrictive clause was amended on the floor of the Senate (Appendix B, No. 3) and sought to be made all-inclusive as to future rent claims.

It was realized that a single descriptive phrase might not be sufficient. It was desired to cover both claims arising in the absence of a special covenant and claims arising on special covenants for damages or indemnity. The phrase "claim of a landlord * * * for damages * * * under a covenant contained in such lease" is a perfect description of this claim and was intended as such. Obviously, all claims thus defined in the clause limiting them as to amount were included in the general description of the new claims permitted to be provable in the future, *i.e.*, "claims for damages respecting executory contracts including future rents".

Some argument may be made that the term "such lease" refers only to "an unexpired lease" and consequently could not refer to a lease such as the instant one which by its terms expired on the filing of the bankruptcy petition. Yet no one, realizing the purpose of the restrictive clause, would think seriously for a minute that Congress intended the whole purpose of this provision of limitation to be entirely evaded by the simple device of making the lease terminate on bankruptcy. If such were once permitted, we are all sufficient students of human behavior to know that all leases would provide for automatic termination on bankruptcy and the restrictive provision would be useless. Dam-

ages to landlords would then be provable in the extreme. As previously pointed out, imagine the effect of unrestricted claims based on 99 and 999 year leases. Furthermore, the landlord, in spite of possible assertions to the contrary, would not run any risk by such provision for automatic termination. Even without the instant provision, if a lease should be burdensome to the bankrupt estate, it would be terminated as a practical matter in the case of a corporate lessee by disaffirmance by the receiver or trustee. Likewise, if such lease should be advantageous to the estate, the landlord would desire termination so as to negotiate new and higher rentals with the estate or third parties, if the estate were liquidated. Such construction would enable the landlord "to eat his cake and have it too". Congress obviously intended no such result. The reference must be construed to mean all leases which, except for the bankruptcy, would not have expired. As so construed, the restrictive clause is intelligible, practicable and wise. If construed otherwise, the clause is impracticable, confusing, unworkable and fails to accomplish its only purpose.

Furthermore, even if the restrictive provisions of clause (7) be construed not to refer to this type of claim and covenant, nevertheless the first part of clause (7)—defining the claims provable in the future—does refer to this claim. That language is so broad as to be susceptible of only that conclusion. This claim is clearly one for damages for loss of future rents and arose under a contract usually termed "executory". As previously stated, this is also indicated by the reference to all "future rent" claims and "claims for damages" under clause (7) as synonymous in the provision relating to the allowance of assigned claims. Since that is true, it is not necessary to go further.

If this claim is included within the first and permissive part of clause (7), it was not intended by Congress to be provable until the enactment of such clause (7).

One more thing should be noted. If, perchance, the instant claim is not included within clause (7), it is not provable in this or any other bankruptcy, past or future. By the *Manhattan Properties* decision, it was not provable prior to the enactment of clause (7) and, if clause (7) relates only to executory contracts or unexpired leases and not to leases which automatically terminate on bankruptcy, Congress by dealing with one type of a future rent claim impliedly excluded this one.

To recapitulate, the intent of Congress as expressed in the *Manhattan Properties* case has been confirmed by Congress. By new amendments not applicable to this case, Congress has made the instant type of claim provable in a limited amount in future bankruptcies. Therefore, this claim could not have been provable prior to such amendments.

IV

The judgment of the Circuit Court of Appeals should be reversed and the instant claim should be expunged.

Respectfully submitted,

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Amici Curiae.

The undersigned counsel for the petitioner and counsel for the respondent hereby acknowledge service of, and consent to the filing of, the foregoing brief of Walter E. Hope and H. Struve Hensel, as *amici curiae*.

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APPENDIX A

The changes in existing law made by the Acts approved June 7 and 18, 1934, involved, among other things, the addition of three new subdivisions to Section 63a as follows:

> "(6) founded upon an award of an industrial accident commission, or other commission, body or officer, of any State or Territory having power or jurisdiction to make awards as workmen's compensation in case of injury or death for injury prior to adjudication; (6½) the amount of any damages, as evidenced by a judgment of a court of competent jurisdiction, in any action for negligence instituted prior to adjudication of defendant in such action in bankruptcy and pending at the time of the filing of petition in bankruptcy, whether voluntary or involuntary; and (7) claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date: *Provided,* That the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: *Provided further,* That the provisions of this clause (7) shall apply to estates, pending at the time of the enactment of this amendatory Act in which the time for filing such claims has not expired."

APPENDIX B

1. New clause (7) of Section 63a as adopted by the House of Representatives on June 5, 1933, read as follows (H. R. 5884):

   "(7) claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, which claims shall be liquidated under Section 63b of this Act."

2. New clause (7) of Section 63a as suggested by the Senate Committee on the Judiciary (Senate Report 482, 73rd Congress, 2nd Session, p. 3):

   "(7) claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for anticipatory breach of an unexpired lease of real estate shall in no event be allowed in an amount exceeding the rent reserved by the lease for the year next succeeding the date of the surrender of the premises."

3. New clause (7) of Section 63a as amended on the floor of the Senate (Vol. 78, Congressional Record, 73rd Congress, 2nd Session, pp. 8109-8110) and as passed by the Senate:

   "(7) claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease for the year

next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date."

4. New clause (7) of Section 63a as recommended in the conference report (House Report 1821, 73rd Congress, 2nd Session) and approved by the President on June 7, 1934 (with the further amendment by S. 3779 approved by the President on June 18, 1934 in italics):

"(7) claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date: Provided, That the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: Provided further, That the provisions of this clause (7) shall apply to estates pending at the time of the enactment of this amendatory Act *in which the time for filing such claims has not expired.*"